No. 3418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE KAPHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

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PERNAU-WALSH PRINTING CO.

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I.

Statement of Case.

On the 19th day of October, 1917, indictments numbers 6272-6273 were found by the grand jury for the Southern Division of the Northern District of California, convened at the City and County of San Francisco, against Harry A. Akers, Lee Yow, Rolub W. Hendricks, Presley A. McFarland and Theodore Kaphan (see Trans. pages 2 to 10 inclusive).

The defendants Theodore Kaphan demurred to said indictments (Trans. pages 11 to 16 inclusive), and his said demurrers having been overruled, entered a plea of not guilty (Trans. pages 17 to 19).

The causes came on for trial on the 12th day of November, 1918, all of said defendants were present in Court, except the defendant Lee Yow, a motion was made for severance of trial on behalf of Lee Yow, and the Court granted said motion.

The jury panel being present in the court room, the defendant Harry A. Akers was arraigned and pleaded "Guilty" to indictments Nos. 6272-6273. On motion of Mrs. Adams, the United States District Attorney, the Court granted said defendants Rolub W. Hendricks and Preseley A. McFarland leave to withdraw pleas of "Not guilty" heretofore entered herein and accordingly each of said defendants, Rolub W. Hendricks and Preseley A. McFarland, withdrew said pleas, and plead "Guilty" to said indictments and this case was continued to November 18, 1918, for pronouncing of judgment upon said defendants Harry A. Akers, Rolub W. Hendricks, and Preseley A. McFarland.

CONSOLIDATION OF ACTIONS.

The Court after hearing the respective attorneys, ordered that the trial of defendant Theodore Kaphan herein be and the same is hereby consolidated with the case of the United States of America vs. Harry A. Akers et al., No. 6273, and the Court ordered that the trial of the defendant, Theodore Kaphan proceed and that the jury box be filled from the regular panel of trial jurors of this Court.

Thereupon twelve persons having been accepted as jurors to try said defendant were accordingly sworn.

Mrs. Adams made statement to the Court and jury as to the nature of the case and called Robert T. Ferguson, William J. Armstrong and Preseley A. McFarland each of whom was duly sworn and examined on behalf of the United States (Trans. page 23). Whereupon the trial of the cause was continued to November 13, 1918, when the defendants Harry A. Akers and Rolub W. Hendricks were each duly sworn and examined on behalf of the United States, the consolidated cases were argued and submitted and the jury returned a verdict of guilty (Trans. pages 25-26).

Thereafter on the 6th day of January, 1919, said defendant interposed a motion for a new trial (Trans. pages 27-28-29-30). That accompanying said motion for a new trial was the affidavit of the defendant Theodore Kaphan (Trans. pages 30-31-32-33-34), and said motion for new trial was on the 16th day of January, 1919, denied, and the Court ordered that the matter of judgment be continued to February 18, 1919 (Trans. pages 37-38), and on the 18th day of February, 1919, said defendant Theodore Kaphan interposed a motion in arrest of judgment (Trans. pages 38-39-40-41-42), which said motion was denied (Trans. pages 44-45-46). Thereafter on said 18th day of February, 1919, judgment was rendered, sentencing the said defendant to imprisonment for the term of two years in the United

States Penitentiary at McNeil Island, State of Washington, said term of imprisonment to run concurrently with that imposed on defendant in case No. 6272 (Trans. pages 47-48-49). Thereafter on the 24th day of March, 1919, a writ of error was sued out to review the judgment and proceedings of the trial Court (Trans. pages 50-51) and on said 24th day of March, 1919, said defendant duly served and filed his assignment of errors (Trans. pages 52-53-54); that on said 24th day of March, 1919, said Court made an order allowing writ of error (Trans. pages 55-56). That thereafter on the 13th day of March, 1919, the defendant presented to the Court his bill of exceptions, which was allowed and settled on the 1st day of October, 1919 (Trans. pages 57-58-59-60-61-62-63).

II.

Specifications of the Errors Relied Upon.

A. The action of the Court in overruling the demurrers (Trans. pages 11 to 16, inclusive) of defendant to the indictments is assigned as error (Trans. page 53).

B. The action of the Court in denying the motion for a new trial interposed by defendant is assigned as error (Trans. page 53).

C. The action of the Court in denying defendant's motion in arrest of judgment is assigned as error (Trans. page 53).

III.

Argument.

1. The action of the Court in overruling the demurrers to both indictments as specified in paragraph (a) of subdivision 2 of this brief constitutes reversible error.

Indictment 6272 shows that Lee Yow delivered to Harry A. Akers certain letters; that Akers delivered said letters to Hendricks, and Hendricks delivered said letters to certain Chinese applicants. Lee Yow paid Akers $45.00 and Akers paid Hendricks $20.00.

McFarland abstracted from the files of the Record Room certain official files and delivered said files to Hendricks and Hendricks delivered said records to Kaphan, but there is no allegation what Kaphan did with said records which would unlawfully and feloniously bring into and cause to be brought into and landing in the United States by sea or otherwise through any port certain Chinese persons, not entitled to enter or remain in the United States. The demurrer for these reasons should have been sustained.

Indictment No. 6273 shows that Lee Yow delivered to Akers certain letters addressed to Chinese applicants containing questions and answers to be used as a means to gain admission to the United States; that Akers delivered said letters to Hendricks; that Hendricks delivered said letters to

certain Chinese applicants; that Lee Yow paid Akers $45.00 and Akers paid Hendricks $20.00.

McFarland abstracted certain files from the Record Room of certain Chinese, delivered these files to Hendricks and Hendricks delivered said files to Kaphan.

It does not appear therefrom what Kaphan did with the said files, nor does it appear that the Chinese named in the records were or were not entitled to enter the United States, nor does it appear therefrom how or in what manner the alleged conspiracy was to be carried out or whether any Chinese persons were ever landed unlawfully at any port of the United States. The demurrer to No. 6273 for these reasons should have been sustained.

The rule is fundamental that the indictment must so allege as to charge a crime within the plain, ordinary meaning, letter and spirit of the statute. In 22 Cyc. 335, the ruling law is stated as follows:

> "c. Sufficiency of Statement—(1) Necessity of Stating Essentials. An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that con-

stitute it. Such facts must be alleged that, if proven, defendant cannot be innocent. Either the letter or the substance of the statute must be followed, and nothing is to be left to implication or intendment or to conclusion. The want of direct averments of material facts cannot be supplied by argument or inference, nor by the conclusion 'contrary to the form of the statute.'"

We also find in 22 Cyc. 295 the law stated that with reference to:

"2. Certainty and Particularity. The indictment should contain such a specification of acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet, and avail himself of a conviction or acquittal as a bar to a further prosecution arising out of the same facts. Such certainty is also required that the court, on an inspection of the indictment, may determine that an offense has been committed, and may confine the evidence on the trial to the issues presented, and in case of conviction may determine what punishment should be imposed, and that a reviewing court may determine from the record whether or not error has been committed. The omission of a material averment in an indictment cannot be supplied by an instruction, or by the proof, or by the finding of the jury of a fact not alleged. Whatever is indispensably necessary to be proved to warrant a conviction must as a general rule be alleged."

It was held in Evans v. United States, 153 U. S. 587, that:

"The crime must be charged with precision and certainty, and every ingredient of which it

is composed must be accurately and clearly alleged. (citing) United States v. Cook, 17 Wall. 168, 174; United States v. Cruikshank, 92 U. S. 542, 558.

The fact that the statute in question, read in the light of the common law, and of other statutes on like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." (citing) United States v. Carll, 105 U. S. 611.

'Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates.' (citing) United States v. Simmons, 96 U. S. 360; United States v. Hess, 124 U. S. 483; Pettibone v. United States, 148 U. S. 197."

2. The action of the Court in denying the motion for a new trial interposed by defendant as specified in paragraph (B) of subdivision 2 of this brief constitutes reversible error, and in this behalf we respectfully call to the Court's attention the affidavit of the defendant which is in words and figures as follows, to wit:

"Affidavit of Theodore Kaphan of Motion for New Trial.

State of California,
City and County of San Francisco.—ss.

Theodore Kaphan, being duly sworn deposes and says: That he is one of the defendants in

the above-entitled action; that subsequent to the trial of defendant, to wit, on the 13th day of November, 1918, I have discovered evidence which will establish the fact that the witness Robert T. Ferguson, testified falsely in answer to questions propounded to him by counsel for this defendant as follows:

'Q. In consideration of your testifying in this case, have you been offered any reward or consideration in the matter of any punishment that might be meted out to you if you were to be found guilty in any of these other cases?

'A. *None whatever.*

'Q. Was any suggestion made to you by the District Attorney or anyone from the District Attorney's office that a plea would be made for you for leniency in the event of your testifying in this case?

'A. *No.*

'Q. Your statement was made to the District Attorney freely and voluntarily?

'A. Yes, it is free and voluntary.'

That at the time when said questions were propounded and the answers thereto made by the said Robert T. Ferguson, one J. B. Densmore was present in the courtroom, sitting at the table with the United States District Attorney, advising with and assisting said United States District Attorney in the trial of this defendant; that said Densmore testified in this case to the effect, that when he was investigating the cases at the Immigration Station, of which this case was one, that he was doing so as a representative of 'The Department of Justice and the Department of Labor.'

That at said time when the said Ferguson was testifying and when the said Densmore was present in court and heard the said Ferguson so testify aforesaid, the said Densmore well knew that he had on the 11th day of November, 1917, more than one year prior to said 13th day of

November, 1918, promised said Ferguson complete immunity, in words and figures as follows, to wit:

'U. S. Department of Labor,
Immigration Service.
In answering refer to
No.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.
Nov. 11, 1917.

My dear Mr. Fergusson,

I hope you will pardon me for not answering *you* letter of the third instant before this time, but the unusual press of official business has prevented me doing so.

I am very happy to confirm your belief that I will look out for the interest of your son Robert. I shall ask that he be given complete immunity as a government witness. This means, of course, that he will not be required to suffer any punishment imposed by the Court. He has, however, been granted no immunity and must rely on my promise to obtain that clemency to which he will be entitled at the proper time. I want to assure you that I have the utmost confidence in him and I also agree with you that he is honest at heart. If and when this matter is over he will take hold of himself and put this mis-step behind him he will go ahead in a straightforward manner with no fear that he will ever again fall by the wayside.

Sincerely,
J. B. Densmore.

Natl. Director of Labor District, Washn., D. C.'
Mr. M. J. Fergusson,
Los Angeles, Cal.

That at the time the said Robert T. Ferguson so testified, he knew that the above and fore-

going letter had been sent to his father by the said J. B. Densmore for his benefit and was familiar with the contents thereof.

That the said Densmore never at any time informed the Judge of this Court or this affiant that he, the said Densmore, had promised the said Robert T. Ferguson, immunity but sat in this Court and permitted this fraud to be practiced on this defendant and on the Court; that the U. S. District Attorney never at any time asked for a severance of the defendants and never at any time informed this defendant or this Court that immunity had been promised the defendant Robert T. Ferguson, but permitted the said Robert T. Ferguson to testify as he did to the great injury to this defendant.

That this defendant did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence have discovered and produced the same upon the former trial.

THEODORE KAPHAN.

Subscribed and sworn to before me this 4th day of January, 1919.

(Seal) R. M. Brown,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed): Filed Jan. 6, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk."

We respectfully submit that the trial Court abused its discretion in denying said motion to the great detriment of defendant, and that the said motion for a new trial should have been granted.

It was held in

Heitler v. U. S., 244 Fed. Rep. 142:

"From the record it is clear that the government must have intended from the first to use

these defendants as witnesses, since without them no possible case of conspiracy was undertaken to be made out. It is likewise clear that immunity for testifying was, before the trial, promised Rosensweig. Although he denied it, his attorney Hulbert, called as a witness for the defense, testified that he made such an arrangement for Rosensweig with the government, and had told Rosensweig if he testified that would be all there would be to it. There is of course no necessary impropriety in making such an arrangement, nor in offering immunity in proper cases. These are matters which usually on behalf of the government rest primarily in the sound discretion and good judgment of its prosecuting officers, acting in good faith for the public interest. But such agreements must not be employed for the purpose, or with the probable effect, of embarrassing other defendants in the conduct of their defense, through leading them to believe that their codefendants are in good faith defending against the same charge, when in truth and to the knowledge of the prosecutor they are not. Under the facts indicated, and particularly with the attention of the prosecutor challenged thereto, the prosecutor should frankly have stated in the beginning that the government expected to call these defendants as witnesses, and that Rosensweig had been promised immunity for his testimony. He might further, with entire propriety, before the trial began, have asked severance (which under the circumstances would undoubtedly have been granted) as to the defendants who were to testify, and thus have avoided the possible unfairness to the other defendants in leaving the court without discretion to separate witnesses who remain only in name as defendants on trial. If from the situation disclosed, the record did not leave it clear that no harm came to plaintiff in error through the prosecutor's failure

to so disclose and to ask severance, it would be the duty of this court to set aside the judgment."

3. The action of the Court in denying defendant's motion in arrest of judgment as specified in paragraph (C) of subdivision 2 of this brief constitutes reversible error.

The same argument given under paragraph 1 of subdivision 3 applies to paragraph 3 hereof.

We respectfully submit that the trial Court erred as above specified in subdivision 2 of this brief and that the judgment rendered in the above and foregoing causes should be reversed and set aside for the reasons hereinabove set forth.

Dated, San Francisco,
February 12, 1920.

HENRY M. OWENS,
Attorney for Plaintiff in Error.